

City of Santa Fe, New Mexico

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www.santafenm.gov

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May 12, 2016

Mr. Findling
The Nature Conservancy
212 East Marcy, Suite 200
Santa Fe, NM 87501

Dear Mr. Findling:

I have received a copy of your email to Brian Snyder dated Wednesday May 4, 2016. I would like to respond to the points you have made in your email.

First, I would state that, to the City's knowledge, the Nature Conservancy does not have water rights nor storage rights on the Santa Fe River. Consequently, the Nature Conservancy has no right to use or store any water. By contrast, several downstream users have water rights and the City is obligated to deliver water to two of them by Court Order, Acequia Cerro Gordo and Acequia Madre. This brings me to the first point in your letter, that "acequia deliveries and environmental flows that support the main river channel have not been mutually exclusive in the past..." Although "by-pass" flows and acequia flows are not mutually exclusive, the Court Order requires that the City prioritize deliveries to the Acequias. When the Nature Conservancy diverts the water that the City is delivering to the Acequias, the City has to increase releases out of storage to meet our delivery obligations. Because the Nature Conservancy has no water rights, nor does it have the right to divert the City's water, the Nature Conservancy is interfering with both the City and the Acequias' lawful use of water.

This brings me to the next point you make in your letter, that the City is using City equipment to benefit a "private acequia". First, an acequia is a political subdivision of the state, so the law does not consider it a private entity. NMSA 1978, § 73-2-11. Second, because of the Court Order, there is no anti-donation clause issue, to which you may be alluding.

Third, the City is not trespassing when it diverted the City's water deliveries back to the main channel of the Santa Fe River. Under New Mexico Law:

A municipality may: A. deepen, widen, dock-cover, wall, alter or change the channel of watercourses; B. cleanse and purify waters, watercourses and canals; C. drain or fill ponds on private property to prevent or abate nuisances; D. construct, repair and regulate the use of vaults, cisterns, hydrants, pumps, bridges, viaducts, tunnels and wells; and E. regulate and authorize the construction of any ditch carrying water on, through or across any street. NMSA 1978, § 3-53-1 (1965).

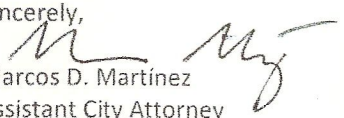
Fourth, I am sure you are aware of the Agreement and Release that the Nature Conservancy executed with the City. That agreement ensured that the City would retain "operational control of the head-gate" which "may include opening, closing, and securing the setting of the head-gate with a locking device." According to our source-of-supply manager, Alex Puglisi, at least one of the City's locks have been cut. Further, "TNC retains the responsibility to maintain the diversion structure... and to restore, modify, or remove the diversion structure and head-gate should the diversion structure and head-gate fail to operate as intended." Mr. Puglisi has also stated that even when the head-gate is open, water flows around the head-gate, meaning that the diversion structure is not operating as intended. This raises a question about whether the diversion structure needs to be removed.

Most recently, someone has breached the earthen berm that the City created pursuant to § 3-53-1, again pushing water into the bypass channel and depriving the Acequias of their lawful use of water. If agents for the Nature Conservancy are responsible for this illegal diversion of water, I would request that they cease and desist such actions.

The City needs to have operational control over its water deliveries to the Acequias. The City will act within its lawful power and ability to achieve this end. However, the City does not object to seepage flows outside of the irrigation season, provided that the City's deliveries of water to the Acequia Madre and the Acequia Cerro Gordo are not impaired.

If you would like to meet to discuss options going forward, please contact Alex Puglisi at 505-955-4232.

Sincerely,


Marcos D. Martínez
Assistant City Attorney

From: MARTINEZ, MARCOS D. <mdmartinez@ci.santa-fe.nm.us>

To: Robert Findling <rfindling@TNC.ORG>; Phillip J. Bove' (pjbove@aol.com) <pjbove@aol.com>; Rebecca Dempsey <rdempsey@cuddymccarthy.com>; John C. Bienvenu <jbienvenu@rothsteinlaw.com>

Cc: SCHIAVO, NICK A. <naschiavo@ci.santa-fe.nm.us>; PUGLISI, ALEX A. <aapuglisi@ci.santa-fe.nm.us>

Subject: The Nature Conservancy

Date: Thu, May 12, 2016 9:21 am

Attachments: 2016-05-12 Letter to Nature Conservancy.pdf (332K)

Dear Mr. Findling:

Please see the attached letter regarding the Nature Conservancy's interference with the City's delivery of water to the Acequia Madre and Acequia Cerro Gordo. We are sending you a paper copy in the mail today as well.

Regards,

Marcos D. Martínez
Assistant City Attorney

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